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NTSB Order No. EA-4066

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of January, 1994

AEROHEAT, INC., Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 135-EAJA-SE-10562

OPINION AND ORDER

Applicant has appealed from the initial decision of Administrative Law Judge Jimmy N. Coffman denying an application for attorneys fees and expenses filed under the Equal Access to Justice Act (EAJA, 5 U.S.C. 504).[1] We deny the appeal.

In 1985, applicant was awarded a certificate to operate a repair station. The certificate was limited to "Specialized

[1]The initial decision is attached.

Service - Repair heaters by metal fabrication and welding standards set forth in MIL-STD-1595 and AC 43.13-1A." Exhibit A-1.[2] Applicant was in the business, primarily, of rebuilding Janitrol combustion tube assemblies for aircraft heaters.

In mid-1986, applicant was advised by the FAA that the certificate had been improvidently issued. The certificate did not indicate what heaters were authorized to be repaired, and it provided no standard for the repairs (i.e., specifications with which applicant's work could be measured and compared to ensure it met the tube's original specifications **or** other standards. The FAA was also concerned because applicant's process included welding, when the Janitrol manual (Exhibit A-4), approved by the FAA, prohibited weld repairs. Moreover, the FAA believed that applicant's process was not repair, but remanufacture or fabrication for which different authority was required.[3]

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[2]The MIL-STD reference was apparently to a military standard; "AC" may refer to an FAA advisory circular. Neither issue is resolved on the record, nor need it be for disposition of this appeal.

[3]According to an FAA witness, applicant received his certificate from an office that was too lenient. This witness also testified that it was his belief that the inspector who issued the certificate did so on the date he retired and had said that he would not do so until he retired. Tr. at 25, 35. Although the FAA required that data be developed as a necessary part of reviewing and granting a repair station authorization and that these data be maintained in a file at the FAA office, there was no such data for applicant's certificate and, when asked to produce its copy, Aeroheat did not. Tr. at 70-71.

Applicant's president and co-owner testified that he was unaware when the inspector had retired in relation to the date the certificate was issued, but that he had provided the FAA with all the documents the inspector requested. He further testified that the inspector was knowledgeable regarding applicant's

Viewed in its worst light, applicant was producing a bogus part that retained the original Janitrol part number, and reinstalling it on certificated aircraft. But, because the FAA also believed that applicant's work appeared of good quality and the process a good one, it did not take enforcement action for some time.[4] Instead, throughout the rest of 1986 and much of 1987, the FAA encouraged applicant to develop the data necessary to receive approval for its process.

Applicant did not do so, and on October 5, 1987, the FAA issued Aeroheat amended operations specifications. In the absence of operations specifications data detailing applicant's process, the amendment only allowed applicant to perform service on the tubes in accordance with Janitrol's manual. The FAA believed that, with the absence of data on applicant's process, it needed to limit applicant to work that had established specifications (i.e., in Janitrol's manual). This prohibited applicant from performing the more extensive rebuilding work it

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process and its focus on welding, and that he had not been concerned that the Janitrol manual prohibited welding repairs. Tr. at 164-170.

[4]"[A]lthough the scope and details of Aeroheats' fabrication methods may not be completely in accordance with FAR [Federal Aviation Regulation] 21, which is established for the manufacturers, they appear to be consistent with authorizations approved for other heater rebuilders under the provisions of FAR 43 and 145." Exhibit R-1 FAA internal memo.

Janitrol would not release heater specifications that could be included in applicant's certificate. Thus, applicant needed to show, by separate test data, that its reconstructed combustion tube assembly was equivalent in all respects to the original part.

had performed in the past.[5]

Applicant declined to comply with the amended rating, and even declined to post it as required by 14 C.F.R. 145.19. Exhibit J-1 stipulations. Applicant refused to acknowledge any amended specifications. Tr. at 96 and Exhibit J-1. Aeroheat continued to use its process of remanufacturing the combustion tubes. Applicant did not appeal the Administrator's order amending its certificate, as was its right. Applicant's refusals to amend its work practices led the Administrator finally to issue, on September 29, 1989, an order revoking applicant's repair station certificate (and any airman certificates) for numerous regulatory violations, most of which involved its work on the combustion tube assemblies.[6]

Applicant appealed the revocation order and, although a hearing was held, the case was settled to the parties' apparent satisfaction and dismissed without a decision on the merits. Applicant was granted Parts Manufacturing Approval (PMA) and was issued a new amended repair station certificate that allowed it to continue the combustion tube assembly work it had been doing all along.[7]

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[5]The FAA believed that applicant was qualified to perform the work authorized by the amended specifications. This included the overhaul of heaters. Tr. at 65. Applicant's witness testified to the contrary. It did not have the necessary equipment for overhauls.

[6]Applicant was charged with violating 14 C.F.R. 145.19, 145.53, 145.51, 145.57(a), and 43.13(a).

[7]The law judge hearing this aspect of the case did make various findings of fact. She found that the inspector who

The instant EAJA application followed. Although the law judge found that applicant was a prevailing party (an issue we do not review; it was not raised on appeal), he denied the application. After thoroughly reviewing the facts of the case, he found that the Administrator had been substantially justified in prosecuting the action.[8] We agree, and find the law judge's opinion so thorough as to require little addition here.

The issues, contrary to applicant's arguments, are not whether Aeroheat's product was a good one, whether applicant's process could or should have been certified, or whether the FAA erred in issuing amended specifications for which applicant did not qualify. The original certificate should not have been framed so broadly and the FAA was obliged to correct its error.

Applicant's consistent position, raised again on appeal here -- that it could continue to operate under the original certificate, ignoring the amendment, and was not obliged even to post the amended specifications because they were improperly issued and unnecessary -- is not defensible under any legal

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issued the original certificate was "too easy" on Aeroheat, but that applicant did not know that there should have been more substantiation and documentation. Tr. at 193. She further found, in light of applicant's continued work with the FAA to obtain a PMA, that the case would be continued for 60 days but that, should matters not be resolved in that time, she would enter an order suspending the repair certificate until Aeroheat complied with the FAA's requirements. Tr. at 202.

[8]See, e.g., Application of US Jet, NTSB Order EA-3817 (1993) ("To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory").

theory even if we assume that the amended specifications were improper ones. While it is also clear that applicant may have detrimentally relied on that original certificate, once Aeroheat was advised that it was improperly issued and inappropriately vague, and after it was amended, applicant's obligation was to mount a timely challenge to the amendment through the established process, or comply, not to ignore the amendment and the FAA and wait for the Administrator to prosecute.

The Administrator's prosecution was reasonable in fact and law. The FAA was legitimately concerned that applicant's process be vetted through the customary documentation requirements. The regulations reasonably require that work be done either in accordance with approved manuals or other methods approved by the Administrator. 14 C.F.R. 43.13(a). Applicant had satisfied neither requirement. In the absence of hard data to show that Aeroheat's work on the combustion tubes left them at least in the same condition as when originally manufactured, the Administrator had legitimate concerns for aircraft safety. As the FAA witnesses testified, looking at the work was not good enough; more detailed part and process specifications and testing were necessary.[9] Accordingly, and especially in view of the FAA's lengthy attempts to work with applicant and resolve the problems informally, revocation was not an inappropriate remedy. Indeed, applicant's attitude can be interpreted as an unwillingness to

[9]The Administrator's witness testified, unrebutted by applicant, that, after Aeroheat work on a tube, only 15% of the original parts remained.

observe legal requirements. Accord Administrator v. Wingo, 4 NTSB 1304 (1984) (revocation is justified by a continuing pattern of conduct showing disregard for regulations or lack of compliance disposition).[10]

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[10]In light of our resolution here, we need not address whether applicant is entitled to fees in excess of $75 per hour, as our rules now allow. We note, however, that applicant did not respond to our reopening order on this matter, NTSB Order EA-3884, served May 17, 1993.